BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **NANCY ELIZABETH DEAN,** **Bar No. 011198** RESPONDENT.	No. 02-2290 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A Probable Cause Order was filed on January 12, 2004. On June 18, 2004, the State Bar filed a two-count complaint alleging conflict of interest and misrepresentations. On July 26, 2004, Respondent filed an answer that was amended on September 27, 2004, and again on December 24, 2004. A settlement conference was held on September 21, 2004, where the parties were unable to reach a settlement. On October 7, 2004, the parties stipulated to an Independent Medical Examination. On October 26, 2004, Chief Justice Charles E. Jones granted an extension of time in which to conduct an evidentiary hearing.

A hearing was held on January 12, 2005. Loren J. Braud represented the State Bar. J. Scott Rhodes represented the Respondent. Respondent Nancy Dean testified in person as did psychiatrist Dr. Steven Pitt, D.O. Betty Smith, Albert Lassen, and Apache County Attorney Christopher Candelaria all testified telephonically having been called by the State Bar. The parties filed post-hearing memoranda on February 9, 2005.

In her Second Amended Answer, Respondent admitted in Count One (conflict of interest) she violated Ethical Rule ("ER") 1.7(b), ER 1.16(a)(1), ER 8.4(d). She denied, however, that she "knowingly" assisted former Judge Michael C. Nelson violate his responsibilities under the Code of Judicial Conduct, and accordingly denied that she

committed a violation of ER 8.4(f). Also in her Second Amended Answer, Respondent admitted the underlying facts in Count Two that she lied to the State Bar and others concerning her affair with former Judge Nelson. Given these admissions, the primary purpose of the evidentiary hearing was to determine the appropriate sanction for the admitted unethical conduct.

FINDINGS OF FACTS

Based on the clear and convincing evidence presented at the hearing, I find the following facts:

Count One (# 02-2290: Conflict of Interest)

1. Respondent had been a member of the Arizona State Bar for approximately 14 years, and a prosecutor with the Apache County Attorney's office for approximately four years when she became romantically involved with former Judge Michael C. Nelson in April 2001.

2. At that time, Nelson was the only elected superior court judge in the county and the only judicial official presiding over felony cases.

3. Within a few months, the relationship between the prosecutor and the judge became a topic of conversation within the small legal community in St. Johns. (*See* Attachment.) Len Schlesinger, Respondent's husband at the time, asserted in his complaint to the State Bar that he was aware of the affair in May 2001. (Hr. Exh. 16.) Respondent and Schlesinger, who was an Adult Probation Officer in Apache County, separated at the end of May 2001. (*Id.*; Tr. at 69-70.) At the hearing there was testimony that Nelson's wife may have learned of the affair in July 2001. (Tr. at 227.) And in September 2001, defense counsel Albert Lassen confronted Respondent about her relationship with Nelson. (Hr. Exh.

7; Tr. at 124, 233-34.) In the Fall of 2001, attorneys and court staff were making jokes about Respondent's relationship with Nelson. (Tr. at 217-18.)

4. By the end of September 2001, Respondent and Nelson had entered into an adulterous relationship. (Tr. at 82.)

5. Respondent and Nelson recognized that there was an ethical problem given their respective positions and attempted to mitigate the ethical problem. (Tr. at 82—84, 86.) Respondent testified she requested a transfer to a civil position that would have the effect of limiting her appearances before Nelson. (Tr. at 87.) In a Memorandum dated June 12, 2001, concerning changes in assignments for the Apache County Attorney's Office, Respondent was assigned to do "Round Valley felonies and misdemeanors and will begin taking on some of the civil." (Hr. Exh. 9; Tr. at 88—89.) In memorandum dated August 17, 2001, the Apache County Attorney assigned Respondent to "Civil" and to train another attorney in misdemeanors, however, she was to keep the cases that had already been charged. (Hr. Exh. 10; Tr. at 91.)

6. Respondent did not tell her superiors about the relationship and why she should no longer represent the State in Nelson's court. (Tr. at 91.) As a result, even after September 2001, Respondent continued to appear before Nelson despite the inherent conflict. (*See* Attachment.) In fact, Respondents' appearances before Nelson continued through November 2002, although they were substantially reduced after November 2001. (*Id.*) While most of the post-October 2001, appearances appeared to be non-adversarial in nature (arraignments, guilty plea proceedings, pre-trial conferences, adoptions), several were clearly adversarial. (*Id.*) The two cases that have been the primary focus of both the Commission on Judicial Conduct and the State Bar are: *State v. Jackie Craig*, and *State v.*

Lee Aaron Baca. In the *Craig* case, Respondent represented the State at sentencing in August 2001. Nelson sentenced Craig to an 8-year prison term. Respondent testified that she had argued for a 12 ½ -year term. (Tr. at 163.) A year later, Craig filed a petition for post-conviction relief asserting Nelson was not impartial because of his relationship with Respondent. In December 2002, pursuant to a stipulation between the State and Craig, Craig was re sentenced to a 4-year prison term. In October 2001, counsel representing Lee Aaron Baca, a teenage father who had entered an *Alford* guilty plea for shaking his 4-month-old baby to death, asked Nelson to recuse from the sentencing proceeding because of his relationship with Respondent. Nelson denied the relationship and refused to recuse himself. On October 30, 2001, Respondent represented the State where she cross-examined mitigation witnesses and argued for a 10-year sentence. Nelson imposed a 4-year sentence for the manslaughter conviction.

7. Respondent failed to disclose the conflict of interest primarily out of a concern to protect Nelson and his reputation. (*See* Tr. at 136, 139-40.) While Respondent has not expressly asserted this, given the totality of the circumstances, including her history and the insights provided by Dr. Pitts, the evidence clearly supports this conclusion.

8. The misconduct spanned from April 2001, when Respondent did or should have reasonably understood that her expressed romantic involvement with the judge in that small legal community would prejudice the administration of justice, through February 2003, when Respondent resigned her position, nearly 2 years later.

9. Contrary to Respondent's belief, the conflict of interest resulted in actual, not just potential, injury. For example, the *Craig* case that required a re-sentencing by another prosecuting agency before another court. Additionally, Apache County suffered an actual

injury in loss of time and resources spent sending letters to all defendants whose cases may have been affected by the conflict of interest. In addition, according to the County Attorney, there have been two post-conviction relief petitions filed alleging the defendants were prejudiced by Respondent's conflict of interest. (Tr. at 255.) Also, there is actual damage to the reputation of the judicial system as exemplified by the complaints to the State Bar and the media coverage demonstrates the actual injury caused by the conflict of interest. (Tr. at 107, 109, 129-31, 218-220, 247, 252, 254-56.) Respondent is correct that media coverage does not prove harm to the general public, but it does establish injury to the administration of justice.

Respondent is also correct there is no evidence that during the period of the conflict the relationship in fact changed the result in any case. There is no evidence, for example, that but for the relationship Craig would have been sentenced to 4 years rather 8 years. But the actual injury here is that because of the relationship, the public and the attorneys are left to speculate concerning the affect the relationship might have had on the result, whether the judge was more or less harsh because of it. As there is no way to dissipate such speculation, public trust in the justice system is undermined beyond calculation.

Conclusions of Law: Based on these findings of fact, the admissions of Respondent, and applying the Rules of the Arizona Supreme Court in effect at the time of Respondent's conduct for this count, the State Bar proved by clear and convincing evidence that Respondent engaged in conduct that is prejudicial to the administration of justice in violation of ER 8.4(d). Based on Respondent's testimony, I find that she believed that her representation of the State would not adversely affect her client despite her relationship with Nelson. Nevertheless, I do not find that belief reasonable under the circumstances of this

case. Thus, I find that Respondent violated the conflict of interest provisions of ER 1.7(b) and ER 1.16(a)(1) for failing to withdraw from all matters in front of Nelson. I find that the conflict of interest occurred at the point in April 2001 when their relationship changed from a professional relationship to a romantic one. In my view, the conflict existed long before the relationship developed into an intimate one.

The State Bar also proved by clear and convincing evidence that Respondent assisted Nelson in conduct that violated Nelson's responsibilities under the Code of Judicial Conduct. ER 8.4(f) provides that is it misconduct for an attorney to "knowingly assist a judge... in conduct that is a violation of applicable rules of judicial conduct or other law." The Commission on Judicial Conduct found that Nelson violated several of the Canons including Canon 2A (A judge shall ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and Canon 3E(1)(a) ("A judge shall disqualify himself ... in a proceeding in which the judge's impartiality might reasonably be questioned ... where... the judge has a personal bias ... concerning a ... party's lawyer."). (Hr. Exh. 31.) After the Commission issued its findings and recommendations, Nelson elected not to challenge the Commission's report but instead resigned. *In the Matter of Nelson*, 207 Ariz. 318, ¶ 2, 86 P.3d 374 (2004). Without disturbing the Commission's findings, the Arizona Supreme Court, exercised *sua sponte* review solely to decide an issue concerning costs, noting that given Nelson's resignation, the only sanction left was censure. *Id.* at ¶ 3 n.1.

First, Respondent believes there has been no finding of judicial misconduct. I disagree. The Commission's findings of misconduct were not disturbed by the Arizona Supreme Court. Moreover, under the plain language of ER 8.4(f), the trier of fact in a

disciplinary proceeding is able to determine whether the offending conduct is a violation of law or the judicial canons. As the State Bar noted, lawyers can be found to have violated ER 8.4(b) without a criminal conviction. *See, e.g., In re Pulito*, Sup. Ct. No. SB-04-0134-D (2004).

Second, Respondent contends that she did not *knowingly* assist Nelson in violating the Judicial Canons because they believed at the time they had "fixed" the problem by limiting her appearances before Nelson. (Tr. at 97, 137, 150.) Even crediting this testimony as truthful, I believe it misunderstands the import of "knowingly." I believe in ER 8.4(f) "knowingly" refers to the "conduct," not the violation. "*Knowing* behavior" is established by looking to objective factors and drawing reasonable inferences from them. *In the Matter of Zawada*, 208 Ariz. 323, ¶ 15, 92 P.3d 862 (2004). Thus, her testimony that she did not believe Nelson was violating the code (Tr. at 106), misses the mark. Ignorance of the law has never been an excuse. There is no question that Respondent knowingly assisted in the conduct that amounted to a violation of the Canons. She knowingly continued to engage in proceedings where the judge's impartiality would be questioned.

Even if *Zawada* could be read to support Respondent's understanding of "knowing" (and it reasonably could), Respondent testified that early in the relationship, they concluded she needed to get out of Nelson's courtroom as soon as possible, although it was not *practicable*. (Tr. at 84.) A reasonable inference from this testimony is that Respondent *knew* the conduct violated the Rules of Professional Conduct, but because conforming to her obligations was not "practicable," she chose not to do it.

Furthermore, Respondent testified that she asked the State Bar to seal their initial investigation into the affair to protect Nelson. Recognizing that the public record of the

initial bar complaint could be used in an election against Nelson, Respondent testified that she asked the Bar to seal the record. "I did it to protect him ... It was my idea." (Tr. at 140.) "When you love somebody the way I love Mike," one does not "want him to be hurt." (Tr. at 139.) In my view, there is clear evidence that Respondent assisted Nelson in violating the judicial canons, but for her participation in the conduct there would not have been any violation. Perhaps, more significant to Respondent, in the context of this case, whether Respondent violated ER 8.4(f) does not affect my recommendation.

Count Two (# 02-2290: Misrepresentations)

10. In October 2001, Betty Smith, Nelson's judicial assistant, sent an anonymous complaint to the State Bar and the Commission on Judicial Conduct, alleging among other items that:

> Judge Nelson is involved in an on going intimate relationship with Nancy Elizabeth Dean, a Deputy County Attorney with the Apache County Attorney's Office. Deputy County Attorney Dean has represented the State in numerous cases that have come before Judge Nelson and she serves as counsel in pending cases. Individuals involved in the Apache County legal system have questioned the sentence given by the judge in at least one case that Ms. Dean has prosecuted. At this time, there is a sentencing pending in a homicide case that Ms. Dean has also prosecuted. Several individuals have also witnessed ex parte communications between the judge and County Attorney Dean.

(Hr. Exh. 25; Tr. at 215, 217.)

11. In a letter dated December 17, 2001, Respondent denied the existence of any intimate or improper relationship with Nelson. "[*L*]*et me categorically* state that *I am not now nor have I ever been* involved in an `intimate' or `improper' relationship with the Hon. Michael C. Nelson. *There is no truth to any of the statements* made by the anonymous letter writer...." (Hr. Exh. 23.) (emphasis added.) As Respondent well knew, that was a lie. At the hearing when asked if at the time she wrote the letter did she realize it was not true,

Respondent answered "I did with respect to intimate. I never would characterize my relationship with Mike as improper, ever." (Tr. at 138.)

12. In a letter dated February 22, 2002, the State Bar dismissed the charges based on the anonymous complaint. (Hr. Exh. 19.) In a letter dated April 30, 2002, Respondent wrote the State Bar and requested that the Bar seal the record of its investigation stating that "[t]he anonymous complaint *containing false allegations* is damaging to the reputations of both Judge Nelson and Respondent." (Hr. Exh. 22.) (emphasis added.) This was untrue as Respondent well knew at the time. Based on this material misrepresentation, the State Bar entered a protective order sealing the record on December 17, 2002.

13. Additionally, Respondent was not candid with other attorneys or her superiors when questioned about her relationship with Nelson. (Tr. at 123, 127, 231-34.)

14. As a result, the conflict of interest was allowed to continue bringing injury to the reputation of the State Bar and the judicial system.

Conclusions of Law: Based on these findings of fact, Respondent's admissions, and applying the Rules of the Arizona Supreme Court in effect at the time of Respondent's conduct, the State Bar proved by clear and convincing evidence that Respondent violated ER 8.1(a) by knowingly making a false statement of material fact, ER 8.1(b) by failing to disclose a fact necessary to correct a misapprehension, and ER 8.4(c) by engaging in conduct involving deceit or misrepresentation.

DISCUSSION OF CONCLUSIONS OF LAW

The State Bar correctly characterized these events as a tragedy. (Tr. at 21.) The record reflects that the conduct was primarily driven by Respondent's love for Nelson and a desire to protect him. Nothing in the record suggests that this conduct would ever be

repeated. Rather, the evidence indicates this was an aberration in Respondent's normal professional conduct. The Bar's witness, Lassen testified in his four years as an adversary counsel with Respondent, this was the only incident that reflected on her ethics. (Tr. at 245.) Because of the situational nature of the conduct, it does not reflect on her ability to practice law and would not be anticipated to reflect on her ability to practice law in the future. While conduct was unprofessional and simply wrong, it was understandable, given human nature and the circumstances of the legal practice in St. Johns.

Furthermore, having observed Respondent testify, I believe the reason she cannot recognize that actual harm resulted from the conflict, is that she is so certain in her integrity and that of Nelson, she does not believe that any case was in fact actually affected by their relationship.

There are, however, two concerns worth mentioning. First, although Nelson had resigned before Respondent filed her initial Answer to the State Bar's complaint, the Answer was less than forthright. This is troublesome. It should not have been. Because there is no record concerning why the verified Answer appears as it does, I simply note it.

Second, Betty Smith testified to a conversation she overheard when, according to her testimony, Nelson specifically requested Respondent to ask the State Bar to seal the record of the initial anonymous complaint. (Tr. at 221.) Respondent had previously testified at the hearing that she had not consulted Nelson before asking the State Bar to seal the report, but told him afterwards. (Tr. at 140-41.) Because several years had elapsed since the conversation in question and in her initial testimony Respondent had qualified her testimony admitting it was only her recollection, after Smith testified, Respondent was given the opportunity to correct the record. She testified that "there is no way that that conversation

took place." (Tr. at 261.) Respondent testified that she looked up the rule and brought it to Nelson's attention after she drafted the letter. (*Id.*) Upon careful review of the transcript, I conclude, given the lapse of time and ease in which an overheard conversation can be misunderstood, I find there is not clear and convincing evidence that Respondent was untruthful in her testimony concerning this event. Had I found otherwise, it would have significantly affected my recommendation.

DISCUSSION OF SANCTIONS

Sanctions are imposed to: (1) protect the public, (2) deter attorney misconduct, and (3) preserve the public's confidence in the State Bar's ability to regulate attorneys. *See In Matter of Peasley*, 208 Ariz. 27, ¶ 64 90 P.3d 764 (2004); *In Matter of Moak*, 205 Ariz. 351, ¶ 7, 71 P.3d 343 (2003). Having concluded that this is not the type of violations that Respondent would repeat, protection of the public is not a concern. While not required for determining attorney discipline, the ABA *Standards for Imposing Lawyer Sanctions* (1992) ("*Standards*"), can be a useful starting point in deciding upon appropriate sanctions. *See In Matter of Clark*, 207 Ariz. 414, ¶ 9 n.2, 87 P.3d 827 (2004).

ABA *Standards*

In applying the *Standards*, the Supreme Court considers "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." *Peasley*, at ¶ 33; *Moak*, at ¶ 8 (citing *Standard* 3.0). When an attorney is found to have violated a multitude of ethical standards, generally the most serious violation serves as the baseline for the punishment. *Moak*, at ¶ 9. Given the findings and conclusions of law, I believe the most serious violation is the false statements to the State Bar and the appropriate *Standards* are

5.11 ("Disbarment is generally appropriate when a lawyer, engages in ... intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."), and 7.1 ("Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for ... another, and causes ... serious injury to ... the public, or the legal system."). For purposes of *Standard* 6.11, the State Bar is an arm of the court. *See* R. Ariz. Sup. Ct. Rule. 31(a). Granted, as Respondent suggests, while aspects of the actual harm are concrete (*e.g.* the *Craig* re-sentencing and the delay in the State Bar's investigation) the full extent and characterization of the actual harm in this case is somewhat subjective in deciding whether the harm equals "serious injury" or "injury" under the *Standards*. However, the Arizona Supreme Court has resolved the issue for purposes of Count Two. Being untruthful during a disciplinary proceeding is one of the most serious ethical violations warranting disbarment absent mitigating circumstances. *In Matter of Varbel*, 182 Ariz. 451, 454 (1995).

Aggravating and Mitigating Factors

The *Standards* employ a series of aggravating and mitigating circumstances that serve to increase or decrease the presumptive degree of discipline. *Standard* 9.0.

Aggravation: Two aggravating factors are present. First, a pattern of misconduct that continued for nearly two years, and multiple offenses. *Standard* 9.22(c) and 9.22(d). However, the record demonstrates that all the offenses arose out of a single continuing course of action, her love affair and the attempt to not to reveal it. Additionally, Respondent took steps to limit the conflict and was successful to some extent in limiting the appearances before Nelson. Thus, in my view this circumstance has little weight. Second, Respondent

obstructed the disciplinary proceeding by intentionally failing to truthfully comply with the State Bar's initial investigation. *See Standard* 9.22(e). This aggravating circumstance, however, is subsumed in the substantive *Standards* 6.11, and 7.1. Thus, in my view, this factor has no weight. Because Respondent's experience in the practice of law did not directly relate to these ethical violations, I do not find it aggravating. Even a new lawyer knows it is wrong to lie to the Bar, and I do not believe that Respondent's legal experience related to her falling in love with Nelson or affected her response to the circumstances in which they found themselves. Moreover, the State Bar did not press this as an aggravating circumstance, thus it is waived.

Mitigation: Several factors in mitigation are present. First, the State Bar has not alleged a prior disciplinary record. *Sandard* 9.32(a). Second, there is an absence, in my opinion, of a dishonest or selfish motive. Based on the record, I believe Respondent's dominate motive was the protection of Nelson, however, misguided. *Standard* 9.32(b). Based on Respondent's testimony, the emotions she revealed and her subsequent actions, I believe by the time Respondent testified at the hearing, she was truly remorseful. *Standard* 9.32(l). This would be entitled to more weight had Respondent been more forthright with the State Bar in 2001, 2002, 2003 or 2004.

Most important, the record substantiates through Dr. Pitt's report, his testimony, and Respondent's own testimony Respondent's personal and emotional problems. *Standard* 9.32(c). The State Bar acknowledged that there was nothing in the record to indicate that Respondent was a bad person, but rather she was at the time of these events "clearly a troubled person." (Tr. at 21.) Respondent was about 40 years old when she first married. She married Len Schlesinger, who was 18 years her senior. (Tr. at 59.) She was his fourth

wife. (Tr. at 72.) According to her testimony, Respondent's prior, serious romantic relationships all involved older men. (Tr. at 34, 36, 44.) Nelson is about 9 years older than Respondent. (Tr. at 206.) Her admiration and love for Nelson was the driving force in her exercise of poor judgment. Her belief that her ex-husband, who was part of the small legal community surrounding the St. Johns courthouse, was attempting to, in her view, unfairly discredit her contributed to her emotional state. Dr. Pitts ruled out any major mental illness or personality disorder that makes Respondent inherently dishonest, or untrustworthy. (Tr. at 204.) Rather, in his opinion, Respondent is an honest, loyal, goal-oriented, decent person. (Tr. at 178.) In my view, based on the record of the hearing, Respondent's emotional state was an aberration. The record reveals that through her evaluation by Dr. Pitts and subsequent counseling sessions with Pepper Davis, Respondent has taken steps to understand what weakness in her led her to the misconduct, and what steps she can take to lessen her susceptibility. I have heavily considered this mitigating circumstance as it is so related to the cause of the unprofessional conduct.

Standard 9.32 does not limit mitigating factors to those listed. It notes only that "[m]itigating factors *include*" followed by the list. (Emphasis added.) In the criminal context, the Arizona Supreme Court has considered the sentence of a codefendant in determining the appropriate sanction. *See, e.g., State v. Kayer*, 194 Ariz. 423, ¶¶ 57—58, 986 P.3d 31 (1999). Nelson resigned and received no further sanction. (see Ariz. Sup. Ct. Minutes, 2/8/2005, SB-04-0141-D) The Arizona Supreme Court could have censured him as a former judge or disciplined his actions as an attorney, but apparently decided not to take such action. Of course, Nelson lost more in his resignation than Respondent did in hers. And from this record, there is no evidence Nelson lied during the investigation. However, I

have found that Respondent lied on Nelson's behalf, and there would have been no actionable conflict without his participation. Thus, I conclude this disparity is entitled to some weight.

Another mitigating factor worth minimal weight is Respondent's public and personal humiliation through the media reports. *See In Matter of Walker*, 200 Ariz. 155, ¶ 25, 24 P.3d 602 (2001). While the humiliation does not reach the level of Walker's humiliation, clearly Respondent's and Nelson's reputations were damaged if not ruined.

I give no weight to the fact that Respondent stopped the practice of law in August 2004 and became an inactive member of the State Bar. *Sandard* 9.4(d). This occurred long after she initially answered the second State Bar complaint and the Arizona Supreme Court rendered its decision in the *Nelson* case. Had Respondent's post-misconduct behavior been timelier, I believe it would have been entitled to weight.

Proportionality Review

Although not required by rule, in the past the Arizona Supreme Court often consulted similar case in an attempt to assess the proportionality of the sanction. *E.g.*, *see In Matter of* Struthers, 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Arizona Supreme Court has also recognized that the concept of proportionality review is "an imperfect process." *In Matter of Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*; *cf. State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992) (abandoning proportionality review in death penalty cases).

Nevertheless, I requested the parties submit three relevant cases on the issue of proportionality. The State Bar recommended Respondent be suspended for three years. In support of this recommendation, the Bar cited *Peasley*, *In re Fuller*, Sup. Ct. No. SB-04-

0130-D (2004), and *In re Alcorn*, 202 Ariz. 62, 41 P.3d 600 (2002). Given the findings in those cases, in my view the conduct in *Peasley* and *Fuller* was far more reprehensible than what occurred here and the harm to the public far greater. Ken Peasley, a prosecutor, was found to have intentionally offered false testimony in two trials against two defendants where death was imposed. *Peasley*, at ¶¶ 31, 35, 46. The Arizona Supreme Court disbarred him. In *Fuller*, the Disciplinary Commission found that Respondent's conduct warranted a suspension of six months and a day. The Commission found an additional aggravating factor of dishonest or selfish motive based on Respondent's deliberately altering 10 trust account checks to reduce any appearance of impropriety. (Com. Rpt.at 3.) The Commission also gave significant weight to *prior* disciplinary offenses which involved a repeated failure to respond or cooperate with the State Bar. (*Id.*) In *Alcorn*, the actual harm was more concrete; here, however it was a single incident at a finite moment in time. Richard Alcorn and Steve Feola expressly mislead a trial judge and conducted a sham trial. *See Alcorn*, at ¶ 50. The Arizona Supreme Court suspended the Respondents for six months. *Id.* at ¶ 51.

Respondent believes that censure plus two-year probation is the appropriate sanction, but if suspension is recommended, it should be for six months or less and retroactive to August 2004. In support of this position, Respondent offers the following three cases: *In the Matter of Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In the Matter of Johnson*, Disciplinary Commission No. 03-0346 (2004); and *In the Matter of Morgan*, Sup. Ct. No. SB-04-0149-D (2005). Like with the cases submitted by the State Bar, none of these cases are "this case." As with the Bar's cases, they provide a very general range for an appropriate sanction. The Respondent in *Fioramonti* , in addition to the original Bar complaint, submitted false evidence in a bar proceeding and had attempted to mislead the

State Bar about the false evidence. *Id.* at 185, 859 P.2d at 1318. The Arizona Supreme Court found that Respondent had "shown himself willing to lie and deceive to accomplish his personal goals, without regard to the consequences to others. To deter others who may be so inclined, we must send a strong message to the bar and the public that this type of behavior will not be dealt with lightly." *Id.* at 188-89, 859 P.2d at 1321—22. However, because of the Respondent's good reputation and that this was one series of events where "panic" caused the Respondent's aberrant behavior, the Court concluded a three-year suspension appropriate and proportional. *Id.* at 189, 859 P.2d at 1322. (J. Corcoran dissented believing disbarment the appropriate sanction). Fioramonti's deception was far greater than Respondent's.

In *Johnson*, Respondent was suspended six months and a day for fabrication of evidence. "Respondent's deception was isolated to the creation of one document and, once confronted, Respondent admitted his conduct. Respondent did not make multiple misrepresentations that were perpetuated for any length of time." (Hr. Off. R&R at 7.) However, Johnson had twice been previously sanctioned. The *Morgan* matter was resolved by an Agreement for Discipline by Consent following a period of time when Wendy Morgan had been on disability inactive status. Morgan agreed she made a false statement to the State Bar during the course of its investigation. The parties agreed that Respondent's statement to the Bar was "made at a time of extreme personal distress and was in all respects a complete departure from her cooperative and forthcoming demeanor prior to that event." (Hr. Off. R&R at 18.) In 2004, the Commission imposed a six month suspension retroactive to the day she became inactive due to disability, in 2001.

RECOMMENDATION

Respondent is an inactive member of the State Bar. At the time of the hearing, she was employed performing non legal work. The presumptive sanction for Respondent's lack of candor with the State Bar is disbarment. Neither the State Bar nor Respondent believes this is an appropriate sanction given the unique circumstances of this case. I agree. I find that the mitigating factors substantially lower the range for an appropriate sanction. Given the totality of the circumstances in the record including the mitigation and proportionality review, I recommend the following actions:

1. Respondent be suspended for six months 30 days from the date the judgment is entered in this matter. I do not recommend that the suspension be retroactive to August 2004 when she became inactive. Merely becoming inactive does not demonstrate rehabilitation. See *In the Matter of Arrotta*, 208 Ariz. 509, ¶ 17, 96 P.3d 213 (2004). As previously stated, to Respondent's credit, she has taken steps to identify what weakness led to the misconduct and to overcome that weakness. By the date of the hearing, Respondent had been evaluated by Dr. Pitts and had seen a counselor four times. (Tr. at 113—14.) While I factor this action into the recommendation of a sanction less than six months and a day, I do not believe it warrants retroactive application to begin the sanction from the day of the evaluation or counseling sessions. Had she not taken such steps, my recommendation would have been different. I believe a six month suspension sanction is sufficient to deter other attorneys from lying to the State Bar and to restore the State Bar's integrity in the eyes of the public. In my view, a longer suspension would be punitive.

2. Respondent's independent expert recommended that Respondent should continue counseling after re-commencing the practice of law. (Tr. at 187–88, 196.) I agree.

Therefore, I recommend that upon Respondent's reinstatement to the State Bar, she be placed on probation for a period of two years with the following terms and conditions:

a. Respondent shall meet with the Director of the Members Assistance Program (MAP), who will conduct as assessment. Respondent thereafter will enter into a MAP contract based upon recommendations made by the Director of MAP.

b. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

3. Restitution has not been requested.

4. Pursuant to Arizona Supreme Court Rule 60(b), Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 7th day of March, 2005.

John Pressley Todd
Hearing Officer 7X

Original filed with the Disciplinary Clerk
this 7th day of March, 2005.

Copy of the foregoing mailed
this 7th day of March, 2005, to:

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ATTACHMENT

ATTACHMENT
CHRONOLOGY OF EVENTS

2001

[*In* **April,** *Dean appeared in* **113** *cases*][1]

April: Dean told Nelson she cared for him and was developing a romantic attraction to him.

Apr. 9: Dean represented the State in *State v. Jackie Craig* (pre-trial conference ("PTC"))

Apr. 16: Dean represented the State in *State v. Lee Aaron Baca* (PTC)

Apr. 30: Dean represented the State in *State v. Jackie Craig* (PTC)

[*In* **May,** *Dean appeared in* **114** *cases*]

May: Len Schlesinger stated he took legal steps to dissolve his marriage to Dean after having "sufficient information" Dean and Nelson were having an affair.

May/June: During this period Dean and Nelson consulted two texts on judicial ethics

May 14: Dean represented the State in *State v. Lee Aaron Baca* (PTC)

May 21: Dean represented the State in *State v. Jackie Craig* (PTC)

May 29: same for both *Baca* and *Craig* matters (PTC)

[*In* **June,** *Dean appeared in* **90** *cases*]

June 12: Date of memorandum of staff changes: "Nancy will do Round Valley felonies & misdemeanors and will begin taking on some of the civil."

June 16—18: Dean left her husband

June 18: Dean represented the State in *State v. Jackie Craig* (PTC)

June 20: Dean represented the State in *State v. Lee Aaron Baca* (Settlement Conference)

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[1] The source of the number of cases in which Respondent appeared before then Judge Nelson each month after August 2001, is from the State Bar's Exhibit 6 and Respondent's Post-Hearing 18-page Exhibit dated 1/19/2005. The source for the number of cases for the period April through August 2001 is Respondent's 27-page Exhibit dated 11/16/2004.

June 26: Dean appeared before Nelson on the *State v. Jackie Craig* case (Settlement Conference); also two cases were scheduled for trial (either jury or bench) that date

[*In* **July,** *Dean appeared in* **38** *cases*]

Jul.: Nelson's wife purportedly learned of the affair

Jul. 9: Dean represented State in Change of Plea in *Jackie Craig* and *Lee Aaron* Baca cases

[*In* **August,** *Dean appeared in* **29** *cases*]

Aug. 13: Dean appeared before Nelson at the sentencing proceeding in *State v. Craig*

Aug. 17: Date of memorandum concerning "New Attorney Assignments" Dean's to handle civil matters, but will continue to handle own charged cases.

[*In* **September,** *Dean appeared in* **48** *cases*]

Sep.: Dean and Nelson's relationship becomes physically intimate

Sep. 11: *State v. Lee Aaron Baca*: re motion to withdraw from plea; *State v. Sossoms*, counsel state positions concerning withdrawing from a plea

Sep. 24: Dean objects in *State v. Lee* concerning a letter from Defendant; in *State v. Escamilla*, Dean had a position on appropriate disposition in the revocation case.

Sep. 24: Dean represented State at motion hearing on the *State v. Lee Aaron Baca* case

Sep.28: Albert Lassen confronts Dean; Dean denies any relationship with Nelson stating "how dare you, don't you know Judge Nelson is a married man."

[*In* **October,** *Dean appeared in* **35** *cases.*]

Oct.6: Date of first anonymous complaint to the State Bar about Dean from Betty Smith

Oct. 9: Date of first anonymous complaint to the Commission on Judicial Conduct ("CJC")

Oct. 15: Dean objects to a continuance in *State v. Baca*

Oct. 26: Counsel in *State v. Lee Aaron Baca* (the 15/16-year-old father killed his 4-month-old baby daughter by shaking her) requests Nelson to recuse himself; Nelson denies any reason exists for recusal.

Oct. 30: Dean represents the State in a contested sentencing proceeding before Nelson in the *Baca* case, cross-exams mitigation witnesses and urged a sentence of 10 years for the manslaughter conviction, defense counsel argued for intensive probation; Nelson sentenced him to 4-years prison

[*In* **November,** *Dean appeared in* **1** *case.*]

Nov. 15: Date of State Bar's letter to Dean concerning first complaint

[*In* **December,** *Dean appeared in* **1** *case.*]

Dec. 17: Date of Dean's letter to State Bar denying relationship: "[*L*]*et me categorically state that I am not now nor have I ever been involved in an `intimate' or `improper' relationship with the Hon. Michael C. Nelson. There is no truth to any of the statements made by the anonymous letter writer* . . . ."]

Dec. 21: Date of Nelson's letter to CJC denying relationship

Dec.27: Dean's dissolution final.

2002

[*In* **January,** *Dean appeared in* **4** *cases.*]

[*In* **February,** *Dean appeared in* **0** *cases.*]

Feb. 22: Date of Bar's dismissal of complaint against Dean

[*In* **March,** *Dean appeared in* **1** *case.*]

[*In* **April,** *Dean appeared in* **3** *cases.*]

Apr. 30: Date of Dean's request that the Bar complaint be sealed: "*The anonymous complaint containing false allegations is damaging to the reputations of both Judge Nelson and Respondent.*"

[*In* **May,** *Dean appeared in* **1** *case.*]

[*In* **June** *Dean appeared in* **1** *case.*]

[*In* **August,** *Dean appeared in* **2** *cases*, **none in July**]

Aug. 22: Date of *Jackie Craig*'s post-conviction relief ("PCR") petition based on Nelson's conflict of interest

[*In* **October,** *Dean appeared in* **3** *cases*, **none** *in* **September**]

[*In* **November,** *Dean appeared in* **1** *case.*]

Nov. 15: Date of letter to CJC and State Bar about Nelson's relationship with Dean

Nov. 19: Christopher Canderlaria sworn-in as the new Apache County Attorney

Nov. 21: Date CJC received new complaint

[*In* **December,** *Dean appeared in* **0** *cases.*]

Dec. 13: Pursuant to a stipulation between counsel for the state and defendant Craig was resentenced.

Dec. 17: State Bar record sealed at Dean's request

2003

Jan.: Betty Smith interviewed by CJC investigators

Feb.: Dean leaves Apache County

Feb. 10: Dean started work for Maricopa County Attorney's civil division (per ltr. 5/27/03)

Mar. 14: Nelson assaults his wife

Mar. 27: Date of State Bar's letter to Dean re: Len Schlesinger's complaint

Spring: White Mountain Independent article

Apr. 2: Date of Janet Wilkins' letter to the CJC and State Bar, stating surprise at the lack of action by either body [*believed that Baca case disposition was influenced by relationship*]

Apr. 7: Date of CJC's Notice of Formal Proceedings

Apr. 22: Date of Nelson's response

Apr. 24: Date of Janet Wilkins' complaint to the State Bar about Dean

May 27: Date of Dean's initial response to new complaint from Dean's ex-husband, Len Schlesinger

Jul. 1: Nelson admits he had an "unprofessional and inappropriate relationship" with Dean

Jul. 7: Probable Cause Panelist denied Dean's request for confidentiality with respect to Dean's ex-husband

Jul. 16: Date of Dean's ex-husband's, Len Schlesinger, correspondence

Jul 28—29: Date of CJC hearings

Aug. 7: Date of Dean's ex-husband's response to Dean's answer to his complaint

Sep. 3: Date of Albert Lassen's letter to the State Bar

Sep. 25: Date of Rhodes' letter [???]

Oct. 7: CJC found Nelson violated the Canons of Judicial Ethics and recommended that Nelson be removed from office

2004

Mar. 26: Date of the Arizona Supreme Court's opinion in *In the Matter of Nelson*

Apr. 22: Order for costs entered by Arizona Supreme Court against Nelson

Jul. 26: Date of Dean's Verified Answer to State Bar's second complaint

Aug: Dean resigns from Maricopa County Attorney's Office

Aug.: Dean becomes inactive

Sep. 22: Dean files Amended Answer

Oct. 22: Dean retains Dr. Steven Pitt

Nov. 4: Dr. Pitt's evaluation of Dean

Dec. 27: Dean files Second Amended Answer

2005

Jan. 12: Hearing for Dean